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VIRGINIA IRON COAL & COKE CO. *v.* HUGHES' ADM'R.

March 16, 1916.

[88 S. E. 88.]

1. Master and Servant (§ 278(10*))—Injuries to Servant—Actions—Evidence.—In an action for causing the death of a mine employee, evidence held insufficient to show that negligence of defendant in maintaining a defective switch was the cause of the employee's death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 964; Dec. Dig. § 278(10).* 9 Va.-W. Va. Enc. Dig. 725.]

2. Evidence (§ 54*)—Presumptions—Grounds.—An inference cannot be drawn from a presumption, but must be founded upon some fact legally established.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 74; Dec. Dig. § 54.* 11 Va.-W. Va. Enc. Dig. 324.]

3. Negligence (§ 134(10*))—Actions—Evidence—Sufficiency.—A right of recovery for the carelessness or fault of the person or his agents must be shown by competent evidence, and plaintiff must show how the accident occurred and some fact or facts by which it can be determined by the jury, and not be left to conjecture, guess, or random judgment, upon mere supposition, without a single known fact.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 270; Dec. Dig. § 134(10).* 10 Va.-W. Va. Enc. Dig. 411.]

4. Negligence (§ 136(2*))—Action—Questions of Law or Fact—What Constitutes.—Ordinary care or diligence in a given case is always a question of fact for the jury in view of the surrounding circumstances when there is substantial evidence on which to submit such an issue, but, in the absence of such evidence, it becomes a question of law for the court.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 279, 281; Dec. Dig. § 136(2).* 10 Va.-W. Va. Enc. Dig. 414.]

5. Negligence (§ 50*)—Care Required—Anticipation of Injury.—It is not negligence to fail to take precautionary measures to prevent an injury which, if taken, would have prevented it, when the injury could not reasonably have been anticipated, and would not have happened but for the occurrence of exceptional circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 62, 63; Dec. Dig. § 50.* 10 Va.-W. Va. Enc. Dig. 360.]

6. Negligence (§ 59*)—"Proximate Cause"—Efficient Cause of Injury.—The first requisite of proximate cause is the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally or probably produce the injury, and the second requisite is that it did produce it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 72; Dec. Dig. § 59.]

*For other cases see same topic and KEY-NUMBER in all Key Numbered Digests and Indexes.

For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.* 10 Va.-W. Va. Enc. Dig. 372.]

7. Master and Servant (§ 265(11)*)—Injuries to Servant—Actions—Evidence.—Under Mining Act (Acts 1912, c. 178) § 6, par. 1, providing that it shall be the duty of the mine foreman or assistant foreman of every coal mine to see that every person employed therein shall before beginning work therein be instructed as to any unusual or extraordinary danger incident to his work which may be known or could reasonably be foreseen by the mine foreman or assistant mine foreman, to hold a mine operator liable it must be shown what the unusual dangers were in a particular case, and that one or more of those dangers were the proximate cause of the accident complained of.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 265(11).* 9 Va.-W. Va. Enc. Dig. 725.]

8. Master and Servant (§ 278(2)*)—Injuries to Servant—Actions—Evidence.—In an action for causing the death of a mine employee, evidence held to show that decedent was working under an experienced employee, and that he was himself at the time of the accident an experienced man, so that there was no violation by the employer of Mining Act (Acts 1912, c. 178) § 6, par 2, providing that every inexperienced person employed in a mine shall work under the direction of the mine foreman or some other experienced worker till he has had reasonable opportunity to become familiar with the ordinary danger incident to his work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 956; Dec. Dig. § 278(2).* 9 Va.-W. Va. Enc. Dig. 721.]

9. Judgment (§ 250*)—Conformity to Pleading—Grounds of Recovery.—In an action for causing the death of a mine employee, there can be no recovery on the ground of negligence in employing decedent while a minor, where there is no such charge of negligence in the declaration.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 436; Dec. Dig. § 250.* 8 Va.-W. Va. Enc. Dig. 296.]

10. Master and Servant (§ 95*)—Injury to Servant—Youthfulness of Employee.—That a deceased employee killed in a mine accident was only 15 years and 7 months old is not a ground of recovery for causing his death; the employer being merely required to properly instruct such an employee as to the dangers of his work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 141, 160; Dec. Dig. § 95.* 9 Va.-W. Va. Enc. Dig. 686.]

11. Master and Servant (§ 101, 102(2)*)—Injuries to Servant—Place to Work.—The master's duty is to use ordinary care to provide a reasonably safe place to work, considering the character of the work, and he is liable for injuries to a servant from failure to exercise such

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

care, but employers are not insurers, and can only be held liable in damages for an injury where the employer's negligence is averred and proved.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 172; Dec. Dig. § 101, 102(2).* 9 Va.-W. Va. Enc. Dig. 696.]

12. Trial (§ 155*)—Question of Law or Fact—Demurrer to Evidence.—Where there is a demurrer to the evidence, if the evidence is such that a jury might have found a verdict for the demurree, the court must so find and grant judgment in his favor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 346, 352, 353; Dec. Dig. § 155.* 4 Va.-W. Va. Enc. Dig. 522.]

13. Trial (§ 105(1)*)—Reception of Evidence—Admission without Objection.—The rule that, if a litigant permits evidence to go to the jury which would have been excluded if objected to, the jury may consider it, and give it such weight as they think it entitled to, does not apply to evidence which has no bearing on any fact in issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260, 261, 266; Dec. Dig. § 105(1).* 5 Va.-W. Va. Enc. Dig. 337.]

14. Master and Servant (§ 150(4)*)—Injuries to Servant—Rules and Methods of Work.—Mining Act (Acts 1812, c. 178) § 22, requiring every mine operator to adopt special rules covering all the work pertaining to the mine in and outside of the same, does not require such rules in reference to everything done inside and outside of the mines, nor rules relating to ordinary details of the employment involving work of a simple character well understood by the employee.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 305; Dec. Dig. § 150(4).* 9 Va.-W. Va. Enc. Dig. 685.]

Error to Circuit Court, Wise County.

Action by T. J. Hughes, as administrator of William W. Hughes, against the Virginia Iron Coal & Coke Company. Judgment for plaintiff, and defendant brings error. Reversed and rendered.

D. D. Hull, Jr., of Roanoke, *F. A. Groseclose, Bullitt & Chalkley*, of Big Stone Gap, and *Jackson & Henson*, of Roanoke, for plaintiff in error.

Wm. Werth, of Tazewell, and *Bond & Bruce*, of Wise, for defendant in error.

GRINNAN et al. v. FREDERICKSBURG LODGE NO. 4, A. F. & A. M., et al.

March 16, 1916.

[88 S. E. 79.]

1. Dead Bodies (§ 5*)—Removal—Power of Equity.—A court of equity, notwithstanding the absence of legislation on the subject, has

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.